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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

*Petitioner,*

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF

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Despite plaintiffs' insistence to the contrary, this case is not about the termination of "lifetime" benefits. (Resp. Br. 1, 7, 9, 23).[1] As the District Court held and the Court of Appeals affirmed, plaintiffs' welfare benefits never vested, and Curtiss-Wright always reserved the right to amend its welfare benefits plan and to terminate benefits under the plan at any time for any reason. (Pet. App. 2, 13-15, 35-36). Plaintiffs did not seek certiorari on that or any other issue.

This case is about holding a plan sponsor monetarily liable for doing what it had the acknowledged right to do under its plan: amend the plan and terminate nonvested welfare bene-

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[1] "Resp. Br." refers to the merits brief filed on behalf of plaintiffs-respondents.

fits.[2] Plaintiffs call this holding an "elegant solution." (Resp. Br. 28). But that euphemism does not mask the fact that the effect of this solution is to compromise not only the plan sponsor's rights, but also ERISA's written instrument requirement and its balance of regulation and the costs of compliance. Plaintiffs' arguments, like the decision below, cannot be reconciled with the fundamental statutory principles at stake.

## I. There Was No Violation of ERISA § 402(b)(3) or the Plan.

### A. Plaintiffs' Proposed Interpretation of § 402(b)(3) Would Destroy the Integrity of the Plan Documents.

Plaintiffs acknowledge that any interpretation of ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), must comport with the purpose of the written instrument requirement of § 402(a)(1), 29 U.S.C. § 1102(a)(1): ensuring that participants and others can ascertain the current plan terms with certainty by examining the current plan documents. (Resp. Br. 9, 13). Plaintiffs also admit that the amendment here at issue was made by the revision of the governing plan document setting forth the plan terms. (Resp. Br. 2).

These concessions are fatal to plaintiffs' arguments. Although plaintiffs admit that ERISA defines "person" to include corporations, they argue that the reference in § 402(b)(3) to "person" somehow means something more specific. (Resp. Br. 12). Under plaintiffs' view, a plan would have to identify particular individuals or officers with a company's amendment authority. (*Id.*) Plaintiffs cite no authority, however, for this proposition.[3] Similarly, again without statu-

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[2] Since all affected retirees were given an option to convert to substantially equivalent individual policies, the effect was to shift the cost of continued insurance coverage rather than to terminate coverage. (J.A. 49).

[3] The mere fact that a particular plan sponsor may elect to write its plan documents so as to designate specific individuals to whom it delegates its power to amend (*see* Resp. Br. 12 n. 10, 15-16) does not signify the existence of a statutory requirement to do so.

tory support, plaintiffs argue that a plan must specify more detailed procedures for amendment than "by the Company." (Resp. Br. 11-12).[4]

To evaluate the validity of amendments under the type of procedure that plaintiffs say § 402(b)(3) requires, and so to ascertain the plan terms, a participant or other person looking at a revised plan document would have to determine what terms had been added by amendment, by what individuals they were adopted, and precisely how they were adopted. These are all matters not reflected in plan documents. As would the decision below, plaintiffs thus would make looking at the governing plan documents only a first, uncertain step on the way to determining the current plan terms.

Plaintiffs themselves recognize that such a result cannot be reconciled with ERISA. Although in basic agreement with Judge Roth's approach, which defines the amendment procedure "by the Company" in Curtiss-Wright's plan by reference to Delaware corporate law, plaintiffs would reject it because "the imputed amendment procedure is not to be found within any plan document . . . and, in that sense, the plan documents could not be read with the certainty that would be provided under the Third Circuit interpretation." (Resp. Br. 19). But the Third Circuit's, and plaintiffs' own, interpreta-

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[4] Plaintiffs attempt without merit to find support for this by analogy to the requirement in § 402(b)(1), 29 U.S.C. § 1102(b)(1), that a plan contain funding-related procedures. Plaintiffs argue, based on Department of Labor Interpretive Bulletin 75-5, that the "procedural detail necessary to satisfy section 402(b)(1)" is inconsistent with allowing an undetailed amendment procedure under § 402(b)(3). (Resp. Br. 11 n.8, 15 n.12). However, the Department of Labor Interpretive Bulletin that plaintiffs cite (and incorrectly suggest is a formally promulgated regulation) simply responds to a question about whether a particular funding procedure is permissible under § 402(b)(1). 29 C.F.R. § 2509.75-5 (FR-4). It nowhere suggests that anything like such a procedure is required to satisfy the statute, or that a lesser or different procedure would not also suffice. Indeed, in its introduction, the bulletin precludes any such inferences.

tion does not deliver this promised certainty. Instead, verification that the required procedure has been followed would be possible only by reference to facts not ascertainable from the plan documents.

Plaintiffs' own analysis, therefore, undermines their proposed interpretation of § 402(b)(3). If, as plaintiffs suggest, the goal is to promote certainty within the plan documents, § 402(b)(3) should be interpreted to allow a procedure that could be facially satisfied by what would be evident from the plan documents themselves. The statute therefore should be interpreted to allow an amendment procedure, such as that in Curtiss-Wright's plan, that is satisfied by the Company's revision of the plan documents.

### B. Plaintiffs Cannot Prevail Based on the Construction Expressed by Judge Roth.

#### 1. The Authority for the Amendment Is Established by Its Incorporation in the Plan Documents Published by Curtiss-Wright.

Perhaps aware that the decision below cannot be squared with ERISA's plain language or the overarching purpose of ERISA's written instrument requirement, plaintiffs try to align themselves instead with the view suggested below by Judge Roth: that action "by the Company" means action by one with authority to act on behalf of the Company.[5] Plaintiffs, however, like Judge Roth, mistakenly would limit that to mean "action by [the Company's] highest decision maker—in the case of petitioner, its corporate board of directors." (Resp. Br. 18; Pet. App. 8-9 n.3). There is no logical or legal basis for

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[5] The opinion below states: "Judge Roth believes that action by 'the Company' means action by the board of directors *or whomever of the company has the authority to take such action* under the corporation law of the state of incorporation of the company in question." (Pet. App. 8-9 n.3; emphasis added).

such a limitation; nor is it consistent even with Judge Roth's own analysis. As Judge Roth initially recognized (n.5, *supra*), corporate authority may be exercised not only by a corporation's board of directors, but also by those to whom the board has expressly or implicitly delegated such authority. *See, e.g.*, 8 Del. Code § 141(a); 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 438-44, at 387-401 (1990); *see also* p. 8 n.9, *infra*, and U.S. Br. at 19-20.

Further, where an amendment is made by the plan sponsor's publication of a revised plan document, there is no need to look beyond the plan document to evaluate the amendment's validity. If, as Judge Roth suggests, an amendment procedure may be incorporated from a source outside the plan documents, ERISA itself provides a particularly appropriate source. ERISA's requirements that the plan terms be set forth in a plan document and that the plan document be revised periodically to reflect amendments[6] implies a permissible procedure for amendment: by revision of the plan document. *Cf.* 29 C.F.R. §§ 2520.104a-4(b)(2) and 2520.104b-3(b) (the statutory requirements of informing participants and the Department of Labor of plan amendments may be met by providing a revised plan description or summary plan description incorporating the amendment). This procedure also provides the requisite basis for determining whether the plan has been amended. Once an amendment is incorporated in a published plan document, it is readily identifiable as a plan term, and no further procedural cues are needed for this purpose. Therefore, each plan should be deemed to incorporate as at least one permissible method of amendment the revision of the plan documents, and the incorporation of an amendment in a governing plan document bespeaks its validity.

The same result obtains under the default rule provided by trust law. Under that rule, an amendment is valid if the cir-

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[6] ERISA §§ 104(a)(1)(B), 104(b)(1), and 402(a)(1), 29 U.S.C. §§ 1024(a)(1)(B), 1024(b)(1), and 1102(a)(1).

cumstances sufficiently manifest the plan sponsor's intent that it be a plan term. *E.g.*, *Restatement, Second, of Trusts* § 331, comment c; *see also* U.S. Br. 25-26. A plan sponsor's revision of the plan documents unmistakably manifests its intent to change the plan terms. Again, therefore, the incorporation of an amendment in a plan document published to participants establishes its validity.

### 2. The Individuals within Curtiss-Wright Who Were Responsible for the Amendment Acted with the Company's Authority.

Plaintiffs' attempt to profit from the corporate authority standard proposed by Judge Roth fails for another reason as well. Even if it were appropriate to look beyond the plan documents in a case such as this, doing so only confirms that the amendment here at issue was made with Curtiss-Wright's authority.

Plaintiffs, as did Judge Roth, do no more than conclusorily assert the absence of corporate action. (Resp. Br. 9, 20).[7] But the record is to the contrary. The amendment at issue was drafted by Curtiss-Wright's Labor Counsel, Aaron J. Carr, and its Corporate Director of Benefits, Richard DuBois. (J.A. 69-70, 74, 77-78; Pet. App. 39). Mr. Carr's authority to exercise Curtiss-Wright's amendment power is clear: He previously had effected an amendment to the Curtiss-Wright Welfare Benefit Plan in 1976, for example, when he established both the plan Constitution and Trust Agreement under ERISA.

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[7] Plaintiffs' statement that the Third Circuit held that no one with authority had acted on Curtiss-Wright's behalf regarding the amendment at issue (Resp. Br. 9) appears to be based exclusively on the view of Judge Roth, which itself was based on her unduly restrictive and internally inconsistent interpretation of corporate authority. (*See* pp. 4-5, *supra*). Nothing in the decision below reflects such a holding by the court. To the contrary, by invalidating the amendment based exclusively on its conclusion that the plan failed to comply with § 402(b)(3), the Third Circuit essentially acknowledged that the amendment met all other prerequisites of a valid amendment. (Pet. App. 9-11 & n. 4).

(C.A. App. 1231; J.A. 79). By finding that the Constitution effectively set forth plan terms, the District Court implicitly found that Mr. Carr was authorized to establish them. (Pet. App. 36, 39-40). Similarly, by finding that the 1983 plan description drafted by Messrs. Carr and DuBois (and including the amendment at issue) was a "governing" plan document, and awarding benefits to plaintiffs under the terms set forth in that document (except for the disputed amendment), the District Court implicitly found that Messrs. Carr and DuBois were authorized to revise and restate the plan terms on the Company's behalf. (Pet. App. 38). The Third Circuit affirmed both of these underlying findings. (Pet. App. 4, 7, 10, 13-14). Further, the undisputed testimony at trial was that Curtiss-Wright's Labor Counsel and Corporate Director of Benefits—in 1983, Messrs. Carr and DuBois—were responsible for the Company's publication of plan descriptions. (C.A. App. 1115).

Any possible remaining doubt is removed by Curtiss-Wright's approval or ratification[8] of the amendment at issue on at least three separate occasions. First, the amendment was approved as it was being made by Curtiss-Wright's Executive Vice President Charles Ehinger, who reviewed the 1983 plan description before it was issued. (J.A. 74). Second, the amendment was ratified in November 1983 when the Company—through Mr. Ehinger and Executive Vice President Richard Sprigle, and with the knowledge of the Company's Chief Executive Officer, Chairman of the Board of Directors, and President, T. Roland Berner—terminated plaintiffs' benefits pursuant to the amendment and communicated that action by letter to the affected plan participants. (C.A. App. 1272-73, 719-21; J.A. 56-59). Third, both the amendment and the resulting termination of plaintiffs' benefits were ratified,

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[8] *See, e.g.*, 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 437.10, at 386 (1990) ("The question of whether an officer or agent acted within his or her authority is often eliminated by the fact that the corporation by its acts has ratified the act. . . .")

and the authority for them confirmed, by the Company's defense of this litigation from 1984 through the present. Plaintiffs' suggestion that the amendment at issue was the unauthorized action of unidentified "mid-level managers," "minor functionaries," or "the personnel department" without the approval of "a responsible designated amending authority" (Resp. Br. at 2 n.2, 3 n.4, 23) simply cannot be squared with the record.[9]

Plaintiffs also misplace reliance on an unwritten, informal amendment practice to which Mr. DuBois testified at trial. (Resp. Br. 2, 9 n.5). Any such unwritten procedure was, of course, not set forth in the plan documents, hence could not be part of the plan, and so is irrelevant. Plaintiffs themselves would have to agree. They criticize Judge Roth for looking beyond the plan documents to import an amendment procedure from state or federal statutes because, plaintiffs contend, participants would have difficulty discovering such a procedure. (Resp. Br. 19). An unwritten amendment practice would be even less likely to be discovered, and so, under plaintiffs' own analysis, would be an inappropriate standard for evaluating amendments. Further, the courts of appeals overwhelmingly have recognized that a written plan cannot be modified by unwritten or otherwise informal statements or

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[9] While there was no evidence at trial concerning the express delegation of corporate authority in the by-laws or by the board of directors (since this was not an issue at trial), such evidence is not necessary here. As one commentator explained the delegation of corporate authority to corporate officers and other agents:

> [E]xpress authority—formal action—is not always essential. In the absence of any statute, charter or bylaw requiring it, it is not necessary that there be a writing or a vote or resolution of the board of directors or trustees in order to confer authority on persons to bind the corporation. . . . [P]ower to do an act . . . may be inferred from circumstances or implied from the acquiescence of the corporation or its agents in a general course of business. . . . It may be inferred from the situation and conduct of the parties.

Fletcher, *supra* n.8, § 444, at 397-98.

policies. (*See* cases cited in Pet. Br. 24; *see also* AARP Br. 10-11). This bars treating an unwritten amendment procedure or practice as a plan term.

In any event, the unwritten practice identified by Mr. DuBois presents no obstacle to the validity of Curtiss-Wright's amendment. Plaintiffs do not dispute that the corporate executives responsible for the amendment at issue—Curtiss-Wright's Executive Vice President, Labor Counsel, and Corporate Director of Benefits—were members of the executive committee identified by Mr. DuBois. (J.A. 73). Instead, plaintiffs rely on the absence of committee minutes recording the adoption of the amendment. (Resp. Br. 9 n.5). But Mr. DuBois never testified that the executive committee could act only through a formal meeting producing minutes. Further, there would have been no need for minutes memorializing the amendment's adoption because it was being adopted pursuant to a revision of the plan documents. That itself provided a written record of the amendment. *See Aronson v. Servus Rubber, Division of Chromalloy*, 730 F.2d 12, 14-16 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984) (giving effect to substantial compliance with plan termination procedures), and other authorities cited in U.S. Br. 29 n.21.

## II. ERISA Does Not Condition the Validity of an Amendment on the Plan's Compliance with § 402(b)(3).

### A. Plaintiffs' View Would Impose a Penalty for Noncompliance that Is at Odds with ERISA's Remedial Scheme.

Under plaintiffs' view, § 402(b)(3) carries an implied, punitive remedy: A court may strike an amendment if there has been a violation of § 402(b)(3) regardless of whether the violation caused any harm. Plaintiffs point to no other instance under ERISA in which such a draconian penalty is provided,

expressly or by implication, without regard to harm to the plan or to participants. Nor could plaintiffs do so. Such a penalty would be irreconcilable with the careful balance that underlies ERISA as a whole and, particularly, its remedial scheme. (*See* Pet. Br. 21).

Plaintiffs do not address this balance. Instead, they urge that a "no harm no foul" approach would be "cynical." (Resp. Br. 7). The problem with plaintiffs' argument is two-fold. First, ERISA does provide a remedy for a violation of § 402(b)(3). As the Solicitor General explained, "[b]ecause [ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)] provides participants, beneficiaries, and fiduciaries with the ability to compel an otherwise recalcitrant employer to provide a definitive amendment procedure, there is no need to fashion a post hoc remedy of amendment invalidation to enforce compliance." (U.S. Br. 24). *See also* ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) (similarly enabling the Secretary of Labor to compel compliance).

Second, Congress could have conditioned the validity of plan amendments on a plan's compliance with § 402(b)(3), but it did not. Plaintiffs' own arguments regarding the structure of the statute corroborate this conclusion. For example, plaintiffs analogize § 402(b)(3) to § 402(b)(1), which, plaintiffs stress, requires a mandatory "procedure for establishing and carrying out a funding policy." (Resp. Br. 11 n.8, 15 n.12). But the only logical remedy for a sponsor's failure to comply with § 402(b)(1) is to compel compliance under § 502(a)(3) or § 502(a)(5). It would be absurd to invalidate all plan funding, and so effectively invalidate the whole plan, based on such a violation, and plaintiffs cite no authority for doing so. Similarly, as numerous courts of appeals have held, a plan sponsor's failure to comply with the § 402(a)(1) written plan requirement does not invalidate the plan. (*See* U.S. Br. 22). In each of these instances, compelled compliance under § 502(a)(3) or § 502(a)(5), and not the nullification of sub-

stantive aspects of the plan, provides the appropriate remedy for a violation of a § 402 provision.[10]

### B. Plaintiffs Have Not Identified any Harm from any Violation of § 402(b)(3).

Plaintiffs' argument that they do not need to show prejudice from an alleged violation of § 402(b)(3) to enforce a plan's written terms begs the question of whether the amendment here at issue should have been invalidated. (Resp. Br. 21). Plaintiffs themselves acknowledge that the amendment was a "new plan term" and that it was set forth in a governing plan document otherwise enforced by the lower courts. (*Id.* at 2). Thus, the disputed remedy essential to the judgment below is not the enforcement of plan terms; it is the invalidation of a plan term.

It is not surprising, then, that plaintiffs now strain to identify for the first time some prejudice to them flowing from the violation of § 402(b)(3) found below. Plaintiffs' primary argument is that "a responsible designated amending authority" might have stopped the amendment on behalf of Curtiss-Wright.[11] (Resp. Br. 23). That is not only speculative; it belies the record in this case. Curtiss-Wright executives testified unequivocally and unanimously that the amendment reflected the Company's intent. (J.A. 66, 79; C.A. App. 1271-73). Further, the amendment was promulgated, approved, and ratified

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[10] Contrary to plaintiffs' suggestion (Resp. Br. 22 & n.18), the establishment of plan provisions relating to amendments, like the establishment and termination of the plan itself, is a settlor function, not a fiduciary function. *See Restatement, Second, of Trusts* §§ 23, 330-32. In any event, the District Court dismissed plaintiffs' claims for breach of fiduciary duty (C.A. App. 114), and plaintiffs did not appeal from that ruling. Therefore, no such claims are before this Court.

[11] Plaintiffs insinuate that this might have been done because they had "lifetime" health insurance benefits. However, the District Court specifically found, and the Third Circuit affirmed, that plaintiffs' welfare benefits were not vested or lifetime benefits. (Pet. App. 2, 13-15, 35-36).

by authorized corporate agents and by authorized corporate actions. (*See* pp. 6-8, *supra*). It is absurd for plaintiffs now to claim that the amendment at issue and the subsequent termination of benefits somehow were not the Company's acts.

Plaintiffs quickly move on to another, equally untenable argument. They assert that they were harmed by the absence of an amendment procedure because they were "deprived of a record" of the amendment. (Resp. Br. 23). This is not a case, however, of a secret amendment remaining undisclosed to plan participants. *Compare Albedyll v. Wisconsin Porcelain Co, Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985). To the contrary, plaintiffs acknowledge that the amendment here at issue was set forth in the 1983 governing plan document (Resp. Br. 2), and the record shows that this document was distributed to plan participants and available at the Company's benefits office. (J.A. 43, 69; C.A. App. 1188). This plan document itself provides the only statutorily required record of the amendment. *See* 29 C.F.R. §§ 2520.104a-4(b)(2) and 2520.104b-3(b) and p. 5, *supra*; *and see also Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) ("The SPD is the statutorily established means of informing participants of the terms of the plan").

Further, plaintiffs do not explain how they were harmed by being "deprived," as they claim, of "a record which would establish (1) that an amendment was promulgated, (2) the effective date of the amendment, and (3) the actual decision maker." (Resp. Br. 23).[12] Plaintiffs received notice of the

[12] Plaintiffs' conclusory statement that they spent "seven years of litigation to ascertain that an amendment had been attempted" (Resp. Br. 23) not only ignores the disclosure of that amendment in the plan documents; it also disregards what this litigation was about prior to the District Court's reliance on § 402(b)(3) to invalidate the amendment. Plaintiffs did not bring suit to find out whether or not an amendment had been made; they knew it had been. Instead, plaintiffs alleged that their benefits had vested before 1983 and without regard to the 1983 amend-

amendment through its inclusion in the 1983 plan description. Its effective date was no later than the date of that plan document, which was published in April 1983, prior to the termination of plaintiffs' nonvested welfare benefits. Plaintiffs' lack of knowledge of the individuals within Curtiss-Wright who acted on behalf of the Company in promulgating the revised plan description certainly could not have harmed them, any more than such knowledge could have benefitted them, since revising the plan and terminating benefits were proper unilateral acts of the Company pursuant to rights expressly reserved by it both in prior summary plan descriptions distributed to plan participants and in the 1976 Constitution. In sum, with or without such a "record," plaintiffs' benefits would have been terminated lawfully, as they have been, by virtue of Curtiss-Wright's reservation of the right to effect such a termination.

Ultimately, plaintiffs cannot show any harm flowing from any violation of § 402(b)(3) because, no matter how the statute's requirements are construed, its purpose was fulfilled here. If a plan sponsor's compliance with § 402(b)(3) has any relevance to plan participants, it is as a complement to ERISA's written instrument requirement. In plaintiffs' own words, participants "must be able to ascertain whether putative amendments are part of the 'documents and instruments governing the plan.' " (Resp. Br. 13). By striking an amendment incorporated in the plan documents that were disseminated to plan participants and so unmistakably part of the plan, the decision below disserves the very purpose plaintiffs and the Third Circuit purport to promote.

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ment. (J.A. 12, 13). As noted previously (n.11, *supra*), the District Court and the Court of Appeals held for Curtiss-Wright on this issue, which has been fully and finally litigated.

## CONCLUSION

For the foregoing reasons and those stated in Curtiss-Wright's opening brief, the judgment of the Court of Appeals should be reversed to the extent that it holds Curtiss-Wright liable to plaintiffs for the termination of their employee welfare benefits.

Respectfully submitted,

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